

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DOANH QUOC NGUYEN,

Petitioner,

v.

MAGGIE MILLER-STOUT,

Respondent.

CASE NO. C14-5202 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION AND
DENYING MOTION TO
APPOINT COUNSEL AS MOOT

This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 15), Plaintiff Doanh Quoc Nguyen’s (“Nguyen”) objections to the R&R (Dkt. 16), and his motion to appoint counsel (Dkt. 17).

I. BACKGROUND

On March 10, 2014, Nguyen filed a 28 U.S.C. § 2254 petition for habeas relief. Dkt. 1. He seeks relief from his 2011 convictions by jury verdict of one count of first-degree identity theft, four counts of first-degree theft, five counts of forgery, and one count of second-degree theft, with aggravating circumstances for each offense (position of trust and vulnerability of victims). *Id.* at 1. Before Judge Strombom, he raised two grounds for relief, including that the admission of an affidavit of fraud denied him a fair trial and that his defense counsel provided ineffective assistance of counsel by failing to object to the admission of the affidavit of fraud. *See* Dkt. 1 at 5 and 7.

1 On June 6, 2014, Judge Strombom issued an R&R recommending that the Court
2 deny Nguyen's petition because he failed to demonstrate that the state court adjudication
3 of his claims was contrary to or an unreasonable application of established federal law, or
4 was an unreasonable determination of the facts in light of the evidence presented
5 pursuant to 28 U.S.C. § 2254(d)(1)-(2). *See* Dkt. 15. She also recommended denying
6 Nguyen a certificate of appealability. *Id.*

7 On June 25, 2014, Nguyen filed objections to the R&R. Dkt. 16. Nguyen
8 *essentially* reiterates as objections the bases for relief that he sought in his petition. He
9 objects to Judge Strombom's R&R because (1) the admission of the affidavit of fraud
10 denied him a fair trial and the ability to face his accuser, and (2) that his defense counsel
11 provided ineffective assistance of counsel by failing to object to the admission of the
12 affidavit of fraud, which he only now claims resulted in a violation of the confrontation
13 clause. *See* Dkts. 1 at 5 and 7 and 16 at 1-2.

14 II. DISCUSSION

15 The district judge must determine de novo any part of the magistrate judge's
16 disposition that has been properly objected to. The district judge may accept, reject, or
17 modify the recommended disposition; receive further evidence; or return the matter to the
18 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

19 The Court finds that Judge Strombom's report and recommendations is correct as
20 to its analysis and conclusion that overwhelming evidence supports Nguyen's guilt such
21 that the admission of the affidavit of fraud does not rise to the level of a constitutional
22 violation which impacted the outcome of trial. Based on that conclusion, there is no legal

support for Nguyen's ineffective counsel claim based on the admission of the same affidavit. Nguyen's objections offer no legal argument that demonstrates Judge Strombom's R&R is in error as to these issues. *See* Dkt. 16.

A. Affidavit of Fraud

"[A] federal habeas court may not prescribe evidentiary rules for the states." *Swan v. Peterson*, 6 F.3d 1373, 1382 (9th Cir. 1993). "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions." *Estelle v. McGuire*, 502 U.S. 62, 68 (1991). In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. *Id.* (citing 28 U.S.C. § 2241). The admission of evidence does not provide a basis for habeas relief unless it renders the trial "fundamentally unfair" in violation of due process. *McGuire*, 502 U.S. at 67-69. To obtain relief, a petitioner must show that, in light of the entire record, the alleged error rendered the entire trial so fundamentally unfair "that there is a reasonable probability that the error complained of affected the outcome of the trial" *Carter v. Armontrout*, 929 F.2d 1294 (8th Cir. 1991).

With regard to the admission of the affidavit of fraud, the Washington State Court of Appeals, Division 2, stated:

We agree with Nguyen that a witness may not give an opinion or state a personal belief that the defendant is guilty. *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). But here, even assuming without agreeing that Mrs. Griffin's affidavit of fraud was the equivalent of unconstitutional impermissible opinion testimony about Nguyen's guilt, Nguyen fails to show that any potential error "caused actual prejudice or practical and identifiable consequences." *Montgomery*, 163 Wn.2d at 595 (citing *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007)).

1 Dkt. 13, Exhibit 10 at 8. In arriving at this conclusion, the appellate court thoroughly
2 analyzed the evidence in the record and determined “other strong evidence and the jury’s
3 verdict – that Nguyen was also guilty of charges not related to the checks listed Mrs.
4 Griffen’s affidavit – show that the affidavit of fraud was not the determinative factor
5 here.” *See id.* at 8 and 9.

6 In reviewing the appellate court’s decision and the remainder of the record, Judge
7 Strombom also found that even if the admission of the affidavit of fraud by one of the
8 victims was a violation of Washington’s evidence rules, the trial court’s admittance of the
9 affidavit did not rise to the level of a constitutional error because there was overwhelming
10 evidence of his guilt. *Id.* at 7. Judge Strombom correctly observed the overwhelming
11 evidence of guilt in the record:

12 Mrs. Griffin’s stepdaughter Annette Fender and Mr. Nguyen himself
13 both testified that Mr. Nguyen was not permitted access to the Griffins’
14 bank accounts. Dkt. 13, Exhibit 1, at 58; Exhibit 2, at 208-09. Mr. Nguyen
15 admitted at trial he knew where Mrs. Griffin stored her checkbook, he
16 forged and deposited the checks into his bank account, knowing it was
17 wrongful, and then he fled to Vietnam to cash the checks and never tried to
18 contact the Griffins. *Id.*, Exhibit 2, at 188-89; *id.* at 209, 211, 216, 236. Mr.
19 Nguyen lied to the Griffins about being a medical student and falsely told
20 them he was going to visit family in Wyoming before he fled to Vietnam.
21 *Id.*, Exhibit 1, at 52; Exhibit 2, at 197-98. Annette Fender and a handwriting
22 expert testified that the disputed checks were not written by Mrs. Griffin.
Id., Exhibit 1, at 55; *id.* at 116-17. Large parts of Mr. Nguyen’s testimony
were contradicted by the testimony of other witnesses and by Mr. Nguyen’s
own testimony and bank statements. For example, although he testified the
\$4,000 check was a loan from Mrs. Griffin, he admitted he never attempted
to contact the Griffins after he left the country. *Id.*, Exhibit 2, at 195, 236.
Mr. Nguyen testified that the \$2,600 check was merely reimbursement for
purchases he had made at Best Buy for Mrs. Griffin from his personal
funds, but his own bank statements did not reflect any actual purchases
from Best Buy. *Id.* at 236.

1 Dkt. 15 at 7. Judge Strombom's conclusion and analysis that overwhelming evidence
2 guilt exists such that the admission of the affidavit of fraud does not rise to a
3 constitutional error affirms Washington State Court of Appeals' determination that even
4 if the evidence was erroneously admitted, it was not unfairly prejudicial.

5 The Court concurs with Judge Strombom's analysis and conclusion that the
6 admission of the affidavit of fraud did not rise to the level of constitutional error which
7 impacted the outcome of his trial. The R&R is adopted on this basis.

8 To the extent that Nguyen attempts to raise a confrontation clause claim on the
9 basis of the admission of the affidavit, that issue was not presented to the state courts and
10 is therefore unexhausted. *See* 28 U.S.C. § 2254 (b).

11 **B. Ineffective Assistance of Counsel**

12 To support an ineffective assistance of counsel claim, a petitioner must satisfy the
13 two-part *Strickland* test. *Strickland v. Washington*, 466 U.S. 668 (1984). First, the
14 petitioner must show that counsel's performance "fell below an objective standard of
15 reasonableness." *Strickland*, 466 U.S. at 686. Second, the petitioner must show that the
16 deficient performance prejudiced the defense so "as to deprive the defendant of a fair
17 trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. To prove prejudice,
18 petitioner must establish a "reasonable probability that, but for counsel's unprofessional
19 errors, the results of the proceeding would have been different." *Woodford v. Visciotti*,
20 537 U.S. 19, 22 (2002) (per curiam). "Judicial scrutiny of counsel's performance must be
21 highly deferential." *Strickland*, 466 U.S. at 668- 69.
22

1 A court need not address both prongs of the test. *Strickland*, 466 U.S. at 697. If
2 the petitioner makes an insufficient showing on one prong, the analysis ends there. *Id.*
3 Federal courts “must indulge a presumption that counsel’s conduct falls within the wide
4 range of reasonable professional assistance” *Id.* The presumption of competence
5 includes a presumption that challenged actions resulted from a reasonable trial strategy.
6 *Strickland*, 466 U.S. at 689-90.

7 The Court concurs with Judge Strombom’s analysis and decision on the
8 ineffective assistance of counsel claim. Judge Strombom found “Mr. Nguyen cannot
9 affirmatively demonstrate, as he must, that it was necessarily unreasonable for the Court
10 of Appeals to have rejected his *Strickland* claim.” Dkt. 15 at 10. She correctly observed
11 that when Nguyen presented this claim to the Washington Court of Appeals, he argued
12 that there was “no possible strategic reason for permitting improper opinion evidence
13 showing Frances Griffin believed Nguyen was guilty.” Dkt. 15 at 10 (*citing* Dkt. 13,
14 Exhibit 7). Additionally, she properly noted that “[t]he Washington Court of Appeals
15 adjudicated the ineffective-assistance claim immediately following the court’s discussion
16 and rejection of his evidentiary claim.” *Id.*, Exhibit 10, at 9. Ultimately, she concluded
17 that the Washington Court of Appeals properly analyzed the claim under *Strickland*’s
18 prejudice prong only. *Id.* The appellate court stated:

19 Nguyen also argues that his trial counsel provided ineffective assistance in
20 failing to object to the admission of Mrs. Griffin’s affidavit of fraud. To
21 establish ineffective assistance of counsel, Nguyen must show both
22 deficient performance and prejudice. *State v. Grier*, 171 Wn.2d 17, 32–33,
249 P.3d 1260 (2011). Based on the facts we discuss above, we hold that
Nguyen fails to show that the affidavit’s admission was prejudicial.
Accordingly, his ineffective assistance argument also fails.

1 Dkt. 13, Exhibit 10, at 9-10. Because the Court agrees with Judge Strombom and the
2 Court of Appeals' conclusion that it was it not prejudicial error to admit the affidavit of
3 fraud (*see supra*), the Court finds that Mr. Nguyen cannot affirmatively demonstrate that
4 it was necessarily unreasonable for the appellate court to have rejected his *Strickland*
5 claim. Thus, the Court agrees with Judge Strombom's recommendation that Nguyen's
6 ineffective assistance of counsel claim be denied.

7
8 Although Nguyen for the first time attempts to raise an ineffective assistance of
9 counsel claim on the basis that his counsel permitted a confrontation clause violation by
10 failing to object to the admission of the affidavit, that issue was not presented to the state
11 courts and is therefore unexhausted. *See* 28 U.S.C. § 2254 (b).

12 III. ORDER

13 The Court having considered the R&R, Nguyen's objections, his motion for
14 appointment of counsel and the remaining record, does hereby find and order as follows:

- 15 (1) The R&R is **ADOPTED** for the reasons set forth above;
- 16 (2) The motion for appointment of counsel (Dkt 17) is **DENIED as moot**;
- 17 (3) This action is **DISMISSED**; and
- 18 (4) A certificate of appealability is **DENIED**.

19 Dated this 12th day of August, 2014.

20 

21 BENJAMIN H. SETTLE
22 United States District Judge